IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case Number: **7632/21**

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

20/01/2023
DATE

SIGNATURE

In the matter between:

STANDARD BANK OF SOUTH AFRICA **Plaintiff/ Applicant**

and

S MAKORO **Defendant/Respondent**

JUDGEMENT

MNYOVU A J:

[1] This is an opposed application of Summary Judgement. The plaintiff instituted an action against the defendant for payment of monies allegedly due and owing totalling R 1 608 845.96, for the immovable mortgage property, namely, PTN 2 OF HOLDING 89 PRESIDENT PARK AH, and declaring the defendant's Mortgage Property specially executable in terms of Rule 46A of the Uniform Rules of Court, as well as costs on attorney -client scale.

[2] It is common cause that the parties concluded a home loan agreement. The plaintiff alleges that it is a credit provider to the defendant in terms of Section 40 of the National Credit Act 34 of 2005, and in terms of Section 41 thereof, registered to provide development credit, on or about 14 February 2007, it loaned monies to the defendant. The plaintiff alleges that the indebtedness of defendant is secured by a mortgage bond, with mortgage bond number B070954/07, that was registered in favour of the plaintiff on 02 May 2007. The plaintiff further alleges that the defendant first defaulted its obligation under the loan agreement during January 2008, by failing to pay the full monthly instalments owing. In support of this, the plaintiff relies on the statements of account that proves the defendant defaulted from the inception of the loan agreement.

[3] The plaintiff further alleges that it offered the defendant proposals with solutions to bring her account to date, the defendant was unable to remedy home loan agreement, resulting the plaintiff to instruct its legal representatives on 12 January 2021 to send notice of default and in terms of Section 129 (1) as read with Section 130 of National Credit Act 34 of 2005, to issue and serve Summons to recover its claim from the defendant. Consequently, the defendant is indebted to the plaintiff in the amount alleged to be due and payable as a result of the defendant's breach. In support of this, the plaintiff relies on a certificate of balance. The plaintiff avers that defendant entered the notice of intention to defend, solely to delay proceedings however, the defendant does not have *bona fide* defence.

[4] In the nature of summary judgement, the plaintiff is not afforded an opportunity to reply to the defendant's assertions, but the opportunity to be heard in court of law on arguments. In order to starve off summary judgement, the defendant has to disclose a *bona fide* or honestly, which if proved at the trial, would constitute a defence to the plaintiff's claim see:

Bentley Maudesley & Co Ltd v "Carburol" (Pty) Ltd and Another 1949 (4) SA 873 (C) ; *Lombard v Van der Westhuizen* 1953 (4) SA 84 (C) at 88

[5] In the plea, the defendant denies that she does not have *bona fide* defence, the defendant pleaded in her defence that the amount owed to the plaintiff's claim is inaccurate. The defendant contended that she has good reason that all the financial statements in possession by plaintiff, show that she had paid far more substantial amount of money to the plaintiff, than what it is alleged in plaintiff's claim.

[6] The defendant further pleaded that the plaintiff recklessly granted her credit, which resulted her to be over-indebted. However, in an opposing affidavit deposed by her, the defendant contended that at the time of application of the loan, under common law, the loan agreement concluded between her and the plaintiff at the time, 2007 constituted a credit agreement in terms of National Credit Act 34 of 2005. The plaintiff as a credit provider at the time (2007) had statutory obligations, to comply with terms, condition imposed by the NCA. The defendant alleges that the plaintiff failed to comply under the common law, alternatively, its obligation in terms of NCA, the plaintiff entered into contract with the defendant that was *contra bonis mores* by providing a loan on repayment amount which the defendant clearly could not afford.

[7] For the reasons above, the defendant contends that at the time of application of loan, she was over-indebted, she signed home loan application documents, which provided information depicting her personal status, employment details, and salary details, where she declared her gross annual income as R230 000 per annum, that equates to R19 166.66 per month, from the above information, the plaintiff approved her application loan with the bond repayments of R15 471.10 per month. The defendant avers that since the inception of the loan agreement despite being over-indebted, she endeavours to make payments, to whatever amount

she could afford. Therefore, the defendant cannot specially execute her mortgage property, as she disclosed in the application home loan that the property, she is self-employed, has children and the property will be used as the primary residence.

[8] In the circumstances, the defendant alleges that the plaintiff caused and/or allowed her to be over-indebted to it and causing her even greater financial harm. The plaintiff as a credit provider bound by the National Credit Act 34 0f 2005, failed to conduct assessment on the available information before it, at the time of the conclusion of the loan agreement. The plaintiff failed to accurately determine defendant's existing financial means, defendant's debt repayment history, defendant's understanding of the risks and costs of the proposed credit agreement, in particular, loan agreement. The defendant contended that the plaintiff's failure was evidenced by that, the terms, conditions and obligations were not explained to her fully, in such that she could not make informed decisions.

[9] An application for summary judgement is considered to be trite and established. The defendant must satisfy the court that he has *bona fide* defence to the plaintiff's claim and the full nature and grounds thereof. In *Oos -Raandse Bantoesake Administrasieraad v Santam Versekeringsmaatskappy Bpk 1978 (1) SA 164 (W) at 171,* it was stated that not a great deal is required of a defendant but that he must lay enough before the court to persuade it that he has a genuine desire and intention of adducing at the trial, evidence of facts which, if true, would constitute a valid defence. All that court enquires into is whether the defendant has fully disclosed the nature and grounds of his defence and the material facts upon which it is founded and whether, on the facts disclosed so disclosed the defendant appears to have a defence which is *bona fide* and good in law. See *Maharaj v Barclays National Bank* 1976(1) SA (A) at 426.

[10] During the oral hearing both counsels representing the plaintiff and defendant addressed this court on the disputed facts, the court was tasked to determine whether the defendant has demonstrated *bona fide defence* in her defence, whether the National Credit Act 34 of 2005 has retrospective effect in this case, whether the defendant has proved defence over -indebtedness, and whether defendant approached debt counsellor prior institution of litigation.

[11] Counsel representing the plaintiff disagreed with the defendant's contention that the plaintiff failed to comply obligations imposed by the National Credit Act of 34 of 2005 at the time of conclusion of the loan agreement, as the National Credit Act came into effect on 1 June 2007 and its effect is not retrospective. It was argued that the provisions of Regulation 23A, read with Schedule 3 of NCA only came into effect on 13 March 2015, as the loan agreement was concluded on February 2007, the plaintiff was not bound by the NCA.

[12] Furthermore, Counsel representing the plaintiff submitted that, the defendant cannot raise the defence that she was granted reckless credit in terms of provisions of Section 80 (1) at the time, even if it was applicable, the defendant will not succeed in its case. The defendant should prove that the granting of the credit amounts to reckless credit granting, Furthermore, she argued that the defendant cannot declare that she was over-indebted as she did not attend debt counselling before litigation in terms of section 85, or placed on debt review in terms of section 86, the defendant should prove to this court that she is over-indebted in terms of the provisions Section 79 of NCA, ventilating the grounds that caused her over-indebtedness. At present moment, the defendant's defence has no merit, there are no triable issue, the defendant is indebted to the plaintiff under the loan agreement, the court can determine if the mortgage property can be specifically executable in terms of Rule 46A, the property is not a primary residence and the mortgage property is secured by mortgage bond in favour of the plaintiff.

[13] Counsel representing the defendant submitted that National Credit Act 34 of 2005 has retrospective effect in this case, in that, the provisions of section 3 of National Credit Act came into effect on 1 June 2006, (9) nine months prior to the conclusion of the agreement between the parties. Counsel argued that in terms of sections 3, over -indebtedness at the time the agreement was entered into, is relevant only when reckless credit-granting is being investigated as cause of over -indebtedness, meaning that a consumer may be regarded as being over-indebted or as over indebted as a result of having been granted reckless credit.

[14] Furthermore, Counsel representing defendant argued on how to apply legal principles to the facts, he indicated that, the provisions of NCA do apply to the credit agreement by virtue of Schedule 3, particular 4(2) which states that Part D of the Act applies to pre-existing credit agreements, insofar, as it does not relate to reckless credit, therefore, the provisions of the NCA insofar it extends to over-indebtedness are applicable. Furthermore, argued that, in this case, despite the defendant firstly, raised defence of reckless credit granting, and later raise her defence in her opposing affidavit that, she became over-indebted as a result of the granting of credit agreement at the time, this is supported on her application home loan, where it shows at the time she was earning R230 000 per month, the court should take regard to the circumstances at time of application for the credit facility.

[15] With regard execution of the mortgage property, the counsel representing the defendant submitted that, it is evidenced by the bond statements provided by the plaintiff that despite defendant being over-indebted due to plaintiff's action, the defendant managed to pay excess of R2 million in respect of the mortgage bond, the defendant already paid the capital amount in respect of mortgage bond, and the outstanding amount represents outstanding interest charges thereon. The circumstances need intervention and assistance in law.

[16] In considering the conspectus of all relevant factors- the facts, it is inherent in law and practice of summary judgement that the merits of a denial is one determining factors in deciding on the grant or refusal of an application for summary. The remedy of summary judgement has the hallmark of final judgement in that it closes the doors of the court to the defendant and permits a judgement to be given without a trial. In *Dowson and Dowson Industrial Ltd v Van der Werf* 1981 (4) 417 (C) AT 419 it was noted that an ever increasing reluctance to grant summary judgement in the face of opposition, was evident from the South African courts. Therefore, the court must always be reluctant to deprive the defendant of his normal right to defend, except in a clear case. See *Standard Bank of SA Ltd V Naude* 2009 (4) SA 669 (E) at 672C-676D.

[17] In the present case, the defendant's defence is on factual and other legal grounds. Factually, the amount owed to the plaintiff is placed in dispute by the defendant, in that much was paid, possibly not indebted to the plaintiff at all. The defendant raised a point of law, namely over-indebted, this is where the provisions of Section 79 of National Credit Act 34 of 2005 will apply, and will lead the court to determine whether the NCA 34 of 2005 has a retrospective effect in this case. The National Credit Act came into effect on 1 June 2006, the parties concluded the contract on February 2007, which means the National Credit Act has retrospective effect from 01 June 2006, therefore under common law, the plaintiff was obliged to follow Section 79 National Credit Act 34 of 2005 as required by the law.

[18] For purpose of this judgement I will make reference to the Government Gazette, No 28619, which was published on 15 March 2006, pages 112 and 114 under Section 79 which in my view is relevant to this case. In legal principle, the NCA, under Part D, sates that under: *"section 79 (1) - A consumer is over-indebted if the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to*

satisfy in a timely manner all the obligations under the all the credit agreements to which the consumer is a party, having regard to that consumer's-

(a) financial means, prospects and obligations

(b) probable propensity to satisfy in a timely manner all the obligations under all the credit of agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment.

"section 79(2) – when a determination is to be made whether a consumer is over-indebted or not, the person making that determination must apply the criteria set out in subsection (1) as they exist at the time the determination is being made.

[19] In determining whether the defendant approach debt counselling prior to litigation, in terms of Section 85 read with section 86 of the National Credit Act 34 of 2005 is a valid point in law. Section 85 of the National Credit Act 34 of 2005 allows the court, where it is alleged that the consumer under credit agreement is over-indebted to (a) refer the matter to debt counsellor, or (b) declare that the consumer is over-indebted and make an order contemplating such. In this case, the defendant did not raise debt counselling as defence. I am of the view that the trial court will consider to refer the defendant to debt counsellor as it fits.

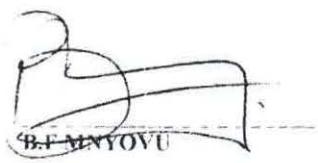
[20] I cannot see how it can be argued that this is a clear case where the plaintiff is entitled to summary judgement. I do not have to be satisfied at this stage of the veracity of the defendant's allegations. The issues between parties can only be clarified and ventilated at the trial, after a full set of pleadings and discovery had been exchanged. I am satisfied that defendant has disclosed a *bona fide* defence, good in law, which if proven at the trial, would constitute a complete answer to the plaintiff's claim. The defendant is therefore entitled to be granted leave to defend.

[21] In the result it is ordered that:

17.1 Summary judgement is refused:

17.2 The defendant is granted leave to defend.

17.3 Costs are in the main action.



B.F MNYOVU

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of Applicant	:	**Adv. K Reddy**
Instructed by	:	
	:	**Vezi & De Beer Inc**
Counsel on behalf of Respondent	:	**Adv J Scheepers**
Instructed by	:	**Mr**
		J J Jacoobs Attorneys
Date heard	:	**10 October 2022**
Date of Judgement	:	**20 January 2023**